

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AMANDA L. RICKS

Claimant

VS.

CATHOLIC CARE CENTER

Respondent

AND

**KANSAS ASSOCIATION OF HOMES FOR
THE AGING INSURANCE GROUP**

Insurance Carrier

Docket No. 1,014,373

ORDER

STATEMENT OF THE CASE

This matter is before the Workers Compensation Board (Board) on remand from the Kansas Court of Appeals in its unpublished opinion in No. 95,979. The Court of Appeals' opinion was filed January 26, 2007. No review was sought and the Court's order became final on February 25, 2007. The matter was originally decided by the Board in its award of December 30, 2005. Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, David L. Vogel of Topeka, Kansas. The Board has considered the record and adopted the stipulations as set forth in its original Order of December 30, 2005.

ISSUES

1. Was claimant full-time or part-time for the purposes of computing claimant's average weekly wage?
2. What was claimant's average weekly wage on the date of accident?

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This matter originally came before the Board on appeal from the June 16, 2005 Award of Administrative Law Judge John D. Clark. The Administrative Law Judge (ALJ) awarded claimant a 13.5 percent loss of use of the left leg, based upon an average weekly wage of \$464.05. The ALJ determined that the claimant was a full-time employee of respondent.

The Board modified the ALJ's Award, finding claimant to have a 25 percent impairment to the left lower extremity, but affirmed the ALJ on the issue of the average weekly wage. The matter was then appealed to the Kansas Court of Appeals, which, in its January 26, 2007 Memorandum Opinion, reversed the ALJ and the Board on the issue of claimant's average weekly wage.

The Court of Appeals, in its opinion, found the Board to have inappropriately considered the fact that claimant was receiving fringe benefits on the same level as a full-time employee. The matter was reversed and remanded to the Board with instructions "to consider only the statutory factors and to detail its part-time/full-time employment analysis".

At the time of her injury, claimant was earning \$10.35 per hour. Claimant testified that she was hired as a full-time worker, expected to work 40 hours a week. Claimant acknowledged that her hours were reduced between June and September of 2003 after a new director of nursing was hired by respondent. However, business records placed into the record during the deposition of Gayla Jarboe, respondent's human resources director, painted a different picture.¹ It is clear from those records that claimant never worked 40 hours a week on a regular basis and, in fact, rarely, if ever, worked a 40-hour week, averaging only 17.1 hours per week in the 26 weeks leading up to the date of accident. Additionally, claimant's hours per week averaged substantially less after December 2002, contrary to claimant's testimony.

Ms. Jarboe testified that at the time of claimant's accident, respondent's normal and customary workweek for a full-time employee was 64 hours over a two-week period. The Court of Appeals found this testimony to be undisputed, and reversed the Board's use of a 40-hour minimum workweek found in K.S.A. 2005 Supp. 44-511(b)(4)(B), calling the

¹ Jarboe Depo., Ex. 1.

Board's action a disregard of "the Care Center's customary workweek". The Court also instructed that on remand, "the Board must consider the Care Center's regular and customary workweek in calculating Rick's average weekly wage if it finds on remand that Ricks was a full-time employee at the time of the accident".

PRINCIPLES OF LAW

(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee."²

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week."³

ANALYSIS

Claimant testified that she was a full-time employee, expected to work 40 hours per week, with overtime the majority of the time.⁴ However, the pay records⁵ contradict claimant's testimony. Those pay records cover not only the 26 weeks preceding claimant's injury, but go back to December 14, 2002. At no time during this extended period does claimant work 40 hours per week. The Board finds claimant's testimony to be less than credible in this regard. Ms. Jarboe acknowledged that claimant was hired as a full-time

² K.S.A. 2005 Supp. 44-511(a)(4) .

³ K.S.A. 2005 Supp. 44-511(a)(5) .

⁴ R.H. Trans. at 9.

⁵ Jarboe Depo., Ex. 1.

worker, but claimant's hours were reduced, and claimant was not working full-time hours.⁶ As claimant first started working for respondent on September 17, 2002, this reduction in hours appears to have occurred early on in her employment, clearly showing up on the pay checks as early as December 14, 2002, less than three months after claimant's hire. The Board finds claimant to have been a part-time employee on the date of her accident.

If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection."⁷

[I]f the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection."⁸

Based on the pay records,⁹ claimant worked a total of 444.5 hours during the 26-week period immediately preceding the accident. Claimant's total gross earnings during that period compute to \$4,732.10. This results in an average of \$182.00 per week. Ms. Jarboe testified that fringe benefits for claimant's health insurance in the amount of \$95.30 were provided by respondent during 22 of the 26 weeks leading up to the accident. The company paid \$85.00 during the other four weeks, because the company's premiums were less. This averages \$93.72 per week. Ms. Jarboe estimated the company paid \$4.80 every two weeks for dental insurance, which averages to \$2.40 per week. This would calculate to an average weekly wage of \$278.12 on the date of accident.

CONCLUSION

Claimant was a part-time employee with a gross average weekly wage of \$278.12.

⁶ Jarboe Depo. at 5.

⁷ K.S.A. 2003 Supp. 44-511(b)(4).

⁸ K.S.A. 2003 Supp. 44-511(b)(5).

⁹ Jarboe Depo., Ex. 1.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 16, 2005, should be, and is hereby, affirmed in part and modified in part, and an award is granted in favor of the claimant, Amanda L. Ricks, and against the respondent, Catholic Care Center, and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group, for an accidental injury sustained on September 26, 2003, for a 25 percent permanent partial impairment to the left lower extremity, and based upon an average weekly wage of \$278.12.

As of April 3, 2007, there is due and owing claimant 7.28 weeks of temporary total disability compensation at the rate of \$185.42 per week or \$1,349.86, followed by 48.18 weeks of permanent partial disability compensation at the rate of \$185.42 per week in the sum of \$8,933.54, for a total award of \$10,283.40, all of which is due and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of April, 2007

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

It is uncontradicted that claimant was hired by respondent as a full-time employee. Furthermore, she was provided fringe benefits that were only provided to full-time employees. This never changed. Therefore, claimant was employed in an employment where such employees are considered to be full-time employees by the customs of such employment regardless of the number of hours actually worked per day or per week.

Claimant was expected to work or be available to work at least 32 hours per week. As such, her gross average weekly wage should be calculated as a full-time hourly employee, using 32 hours per week times her hourly rate as the base average weekly wage.

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
David L. Vogel, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge